(4)

No. 04-333

Supreme Court, U.S.
FILED
DEC 9 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES C. LOWE,

Petitioner,

v.

WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN, and WAL-MART STORES, INC., as "De facto Plan Administrator, and, DAVID D. GLASS, JOHN B. MENZER, PAUL R. CARTER, JOSEPH S. HARDIN JR., as Plan Trustees, and THE ADMINISTRATIVE COMMITTEE, as Plan Administrator,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner respectfully petitions This Most Honorable High Court for rehearing.

This petition for rehearing is intended to call for the Court to affirm its historical mandate, **"Equal Justice Under Law."**

In 1969, this Court made an historic decision that "the Court must accept as true all well pleaded allegations of fact and view them in the light most favorable to the petition." See: *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1969).

To invoke jurisdiction of the Federal Courts, a Litigate must have suffered, or be threatened with, actual injury traceable to Respondent and likely to be redressed by favorable decision. U.S. Constitution Art. 3, Sec.1 et seq.

STATEMENT OF SUBSTANTIAL CROUNDS OF A CONTROLLING EFFECT (Rule 44.2)

Prior to submission of the Petition, but before resolution of the proceedings, now pending within The State Courts of Georgia, Petitioner LOWE has brought verified charges of Fraud and Conspiracy to Defraud Petitioner and the Courts of the State of Georgia. The foregoing verified allegations include, Mail Fraud, Wire Fraud, Conspiracy to Commit Mail and Wire Fraud and violations of the Racketeering Influenced and Corrupt Organizations Act, of the State of Georgia. The foregoing "verified allegations" brought by Petitioner Lowe against Respondent WAL-MART STORES, INC. d/b/a WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN have not been refuted by "verified response," as required under Georgia Law. See: ***O.C.G.A.*** 9-10-111.

A. STATE COURT ARBITRATION AWARD

The "Arbitration Award" entered by The State Court of Fulton County on June 5, 2002 is a "VALID JUDGMENT" Against WALL-MART STORES, INC. d/b/a WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN. Petition App. 37a-39a

Said "Award" predates the Opinion entered by the U.S. District Court on June 24, 2002 and therefore is the "Right Result" under Georgia Law, in the companion case *Center Neurology v. Lowe v. WAL-MART*. Petitioner Lowe and WAL-MART are "Identical Parties" within the above referenced State Court Arbitration Award. See: *Greyhound Lines v. Cobb County*, 681 F.2d 1327 (11th 1982).

Respondents allegations of "Clarification and Amendment" are not available under Georgia Law. No Appeal was taken, No Objection was made to the Award, and a State Court Judge can not make "Sua sponte" amendment to an "Award." See: ***O.C.G.A.*** 9-9-1 et seq. Also See: Appellants Response to Supplement the Record on appeal. Filed August 11, 2003 within Eleventh Circuit Court of Appeals.

This Court has mandated **"Equal Justice Under Law"** and is compelled to accept as true "all well pleaded allegations of fact and view them in light most favorable to the Petition," *Jenkins*, Id. (1969). The State Court Judgment against Respondent WAL-MART is clear, convincing and unequivocal and is therefore **"Res Judicita,"** with regard to WAL-MART'S liability, within the instant case. *Greyhound Lines*, Id. (1982). WAL-MART'S defense bared. For this Court to rule otherwise is a clear departure from the established precedent setout within: *Jenkins*, Id. (1969).

B. CIRCUIT COURTS' OPINION ERRONEOUS

Lowe reported his "Partial Settlement" to WAL-MART. This fact is recorded within the U.S. DEPARTMENT OF LABOR records. Lowe submitted a request under the Freedom of Information Act to secure Plan Documents and discovered that the DEPT. of LABOR had already launched an Investigation of WAL-MART HEALTH PLAN, based upon "Voluminous Complaints" from many hundreds of Plan Participants regarding improper denial of their Health Care Benefits. DEPT. of LABOR found violations of ERISA Act and "Ordered Corrections."

Lowe's "Partial Settlement" did not fully compensate his Economic Loss. WAL-MART paid several thousand dollars in benefit payments for Lowe triggering the MAKE WHOLE DOCTRINE. *Gries v. WAL-MART (R3-51).* Petition p.7. MAKE WHOLE DOCTRINE applies, when benefits granted.

Circuit Court's Opinion Erroneous, Pet. App. 4a, Par. 1 the benefits paid to Petitioner LOWE were paid before request for submission of "Subrogation Form" to be signed by LOWE. Pet. App. 15a, Par. 1, District Court reported "At some point after the accident ... (the Plan) sent Plaintiff a "Subrogation Agreement" See: Pet. App. 15a, Par.1. This too is erroneous, in that the request was not sent to LOWE, but to LOWE'S wife.

See: REPLY TO BRIEF IN OPPOSITION p.6, ERISA "BENEFICIARY" as defined within the Statute 29 U.S.C.A. 1002(8) is a NON-SIGNATORY BENEFICIARY, therefore a NON-PARTICIPANT. No Agreement exists between the WAL-MART ERISA Plan and a "Plan BENEFICIARY."

C. FEDERAL COURT OPINIONS UNLAWFUL

On June 24, 2002 The District Court dissolved the Order for Stay entered on May 24, 1999, based upon the "VOID JUDGMENT" of the Superior Court of Fulton County. See page 5 this writing.

Previously the District Court had made numerous egregious errors with regard to Proper Procedural Due Process of Law to be afforded in ERISA cases. See: page 6 & 7 this writing. DENIAL OF DUE PROCESS OF LAW, Petition p.21-30. U.S. Constitution, *Firestone*, *FMC Corp.*, etc.

Petitioner LOWE offered incontrovertible facts supporting his allegation of Respondent WAL-MART'S invalid Plan Documents. Circuit Courts Opinion Erroneous, Pet.App.4a, Par. 2. The record, within the District Court, clearly reflects That the Plan Documents, as they existed in 1994, require "Assignment of the Right of Action" against any "At Fault Tort-feasor." 1993 WRAP Document, Sec. 5.4. Such an Assignment is forbidden under Georgia Law. See: ***O.C.G.A.*** 44-12-24. Pet.p5 #17. This Statute is directed toward the Insurance Industry and would therefore enjoy "Preemption Exemption" under ERISA. Additionally all State Laws of General Application are preserved. See: *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992).

The District Court failed to establish surviving Georgia Law, as "No Pretrial Order" was issued. Pet.p. 23 #10.

The foregoing has resulted in Denial of Due Process of Law. **U.S. Const. Amendment 5** and **Constitution of Georgia.**

Denial of Due Process results in a "VOID JUDGMENT."

The U.S. Court of Appeals for the Eleventh Circuit failed to address the foregoing Denial of Due Process and affirmed a **"Constitutionally Infirmed Judgment."**

Resolution of the UNRESOLVED ISSUES as setout within the Petition p.30 will result in a different ruling.

Both the U.S. District Court and U.S. Court of Appeals For the Eleventh Circuit have exceeded their jurisdiction based upon **"DENIAL OF DUE PROCESS OF LAW."** Supreme Court has duty to investigate allegations.

Based upon the foregoing the Opinions of the U.S. District Court and U.S Court of Appeals are UNLAWFUL and should not stand, as they are the result of Denial of Due Process. U.S. Constitution Amendment 5, and Constitution of Georgia.

D. FEDERAL ACTION STAYED

The Honorable Orinda D. Evans entered an Order on May 24, 1999, staying the District Court action pending final resolution of the cases proceeding within State and Superior Court of Fulton County. See: Pet. App. 32a-36a.

Judge Evans ruled that "State Law" was controlling within These related actions, with regard to Subrogation, 35a Par.2 and that lawful resolution would be dispositive, with regard to the Federal action. The State Court Arbitration Award Is the "Right Result" under Ga. Law. See: Pet.App. 37a-39a.

E. SUPERIOR COURT ORDER VOID JUDGMENT

Petitioner LOWE incorporates by reference page 4 of his REPLY TO BRIEF IN OPPOSITION to positively assert *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 as controlling authority regarding "Lack of In Personum Jurisdiction" over Respondent WAL-MART, with regard to action taken by the Superior Court of Fulton County and assert that Appeal is Pending regarding said "Alleged Judgment."

F. RESTATEMENT OF REASONS FOR GRANTING THE PETITION

Petitioner LOWE incorporates by reference his pleading as Presented within: REPLY TO BRIEF IN OPPOSITION Pages 6 and 7, as controlling precedent with regard to:

1. Petitioner LOWE'S "NON-PARTICIPANT" status.

2. Prohibition of "Retrospective Application of Law" within The State of Georgia.

3. Assertions that rulings made by the Highest Court in the State are binding upon Federal Courts that have situs, within the several States. Cir. Court applies law in the same manner, as the highest Court in the State.

G. ENUMERATION OF PREJUDICAL ACTS AND JUDICIAL MISCONDUCT

1. Judge Evans of the U.S. District Court of the Northern District of Georgia allowed the following acts to be committed within her Court and failed to dicipline the offending Agents.

a. Allowed filling and verificaiton of false pleadings.

b. Allowed submission and verification of false affidavits.

c. Allowed filing of incomplete mandatory disclosures.

d. Allowed failure to submit amendments to mandatory disclosures by Defendants, after notice of deficiency.

e. Allowed an Agent not licensed to practice law within The State of Georgia to sign and file pleadings.

2. Judge Evans of the U.S. District Court committed the following acts, that were prejudicial to Plaintiff Lowe in violation of **The Judicial Code of Conduct.**

a. Allowed the foregoing acts, as further setout within No. G.1. above to be committed by several agents acting on behalf of Respondent WAL-MART.

b. Failed to properly apply legal principles without committing prejudice toward Plaintiff LOWE.

c. Failed to uphold the U.S. Constitution, by denying Due Process of Law to Plaintiff LOWE.

d. Violated Judges Oath of Office.

e. Violated Attorney's Oath.

f. Failed to apply relevant decisions of Ga. Supreme Court, as required by 11th Cir. Binding Precedent.

g. Used "Retrospective Application of Law" to deny lawful Health Care benefits to Petitioner LOWE.

h. Failed to apply relevant Trust Law, resulting in loss of $130,000.00 dollars in Health Care Benefits.

The foregoing clearly constitutes **"Bias and Prejudice"** heretofore unseen in the Annals of Federal Jurisprudence.

SUMMARY

The Relevant Facts of this case are plainly stated. The **Arbitration Award** entered in State Court of Fulton County Georgia against the Respondent WAL-MART is a Final Judgment, that has not been appealed and is therefore **Res Judicata**, as to the rights of the several parties.

The alleged Summary Judgment in the Superior Court of Futon County is a **"Void Judgment"** and is of "No Effect."

Denial of Due Process of Law within the U.S. District Court results in a Judgment that is clearly, inevitably, unmistakably **CONSTITUTIONALLY INFIRMED.** Petition p.21-30.

Also see: Pages 6 and 7 this writing.

Affirmation by The Eleventh Circuit Court of Appeals of a CONSTITUTIONALLY INFIRMED JUDGMENT brings into question **THE RULE OF LAW.** Petition p.24-25.

This Most Honorable High Court is bound by the precedent set forth within *Jenkins v. McKeithen,* Id. (1969).

CONCLUSION

For the foregoing reasons The Petition for Writ of Certiorari should be granted, in the interest of Justice. The Court may wish to consider summary reversal.

Respectfully submitted,

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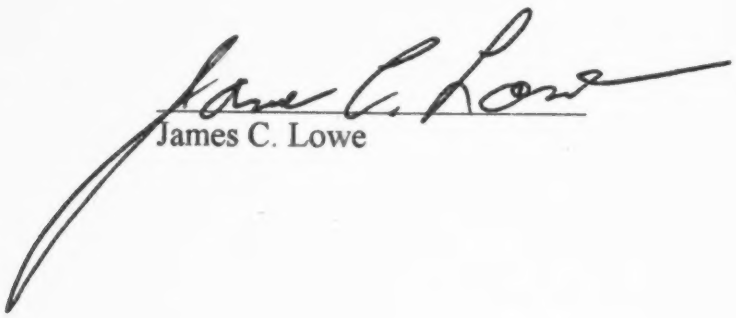
CERTIFICATE OF GOOD FAITH

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.



James C. Lowe